

C. DUKES SCOTT
EXECUTIVE DIRECTOR

1401 Main Street, Suite 900
Columbia, SC 29201



DAN F. ARNETT
CHIEF OF STAFF

Phone: (803) 737-0800
Fax: (803) 737-0801

nsedwar@regstaff.sc.gov

Nanette S. Edwards

Chief Counsel and Director of Legal Services

May 25, 2011

VIA ELECTRONIC-FILING

Jocelyn Boyd, Esquire
Chief Clerk/Administrator
Public Service Commission of South Carolina
101 Executive Center Dr., Suite 100
Columbia, SC 29210

Re: Application of Utilities Services of South Carolina, Incorporated ("USSC") for Adjustment of Rates and Charges and Modifications to Certain Terms and Conditions for the Provision of Water and Sewer Service – **Docket No. 2007-286-WS**

Dear Ms. Boyd,

The South Carolina Office of Regulatory Staff ("ORS") respectfully requests that the Public Service Commission of South Carolina ("Commission") reconsider certain provisions contained in the Directive issued on May 4, 2011 in the above referenced docket.¹ ORS understands that the Commission wishes to fully comply with the South Carolina Supreme Court's ("Court") Order on Remand, but we believe that the recently issued Directive allows USSC to unfairly supplement the record.

In joint discussions with USSC representatives and members of the Commission Staff regarding the Court's Order on Remand, ORS had previously represented that this office wants to work cooperatively with the Commission and USSC as to the next steps in dealing with the Court's Order and would agree to and comply with any decision or directive of the Commission. However, ORS respectfully submits that the Commission's directive to open the record to receive additional evidence does not comply with the Court's Order. ORS believes the actions ordered in the Commission's Directive exceed the scope of what is required to comply with the Court's Order, and we therefore find it necessary to provide the Commission with the following comments.

ORS's interpretation of the Order on Remand is that the Supreme Court has directed the Commission to make a ruling in this case based on the facts and evidence already contained in the record. ORS respectfully requests that the Commission reconsider whether opening the door to allow USSC to supplement the existing record in this manner is required by the Court's Order.

¹ ORS understands that the Commission has the authority to require that such requests be filed after the Directive becomes an order, but the Commission has also, at its discretion and where it deemed appropriate, considered requests prior to an order being issued.

The Court held that “because we find the PSC’s evaluation of Appellant’s rate application was affected by several errors of law, we reverse and remand for further proceedings.” (Utilities Services of South Carolina, Inc. v. The South Carolina Office of Regulatory Staff, 2011 S.C. Lexis 101 at 2) The Court reiterates this finding when it states “[b]ecause the PSC did not give Utility a fair opportunity to respond in this case, we reverse and remand for further proceedings. Cf. Hilton Head Plantation Utilities, Inc., v. Public Service Comm’n of S.C., 312 S.C. 488, 449-52, 441.S.E2d 321, 322-323 (1994) (after finding the PSC did not err in denying a rate increase based on the lack of evidence before it, remanding to provide the utility “an ample opportunity to explain its expenditures and justify them.”) Utilities Services of South Carolina Inc., 2011 S.C. Lexis 101 at 18. It is important to note that the Court at no time gives the express direction to allow the introduction of new evidence. The Court has previously held that “[u]nless this Court provides for the taking of additional evidence, no party may afford itself two bites at the apple. It was improper for the Commission to consider additional evidence.” Piedmont Natural Gas Company, Inc. v. Hamm, 301 S.C. 50, 54 389 S.E2d 655, 657 (1990) citing Parker II, 288 S.C. at 307, 342 S.E2d at 405.

The Court discusses these two cases in Sloan v. Greenville County, 356 S.C. 531 at 562 (2003):

Both Piedmont Natural Gas and Parker stand for the rule that after a case has been remanded by an appellate court, a party cannot submit additional evidence unless the appellate court has given leave to do so. See Piedmont Natural Gas, 301 S.C. at 54, 389 S.E.2d at 657 (holding the supreme court's remand to the Public Service Commission to "substantiate the record" was a direction to the Commission merely to review the evidence which was already contained in the record, not to hold a new hearing for the admission of additional evidence); Parker, 288 S.C. at 307, 342 S.E.2d at 405 (finding the supreme court's remand of an issue to the Public Service Commission for "further consideration" did not permit the Commission to entertain additional evidence not already contained in the record). The rationale for this rule is straightforward: "no party may afford itself two bites at the apple." Parker, 288 S.C. at 307, 342 S.E.2d at 405.

Whether the Court’s direction is reversed and remanded for “further proceedings” or “further consideration”, ORS respectfully submits that without express direction, which *was* provided for in Hilton Head, the Commission should not entertain additional evidence not already contained in the record. (Hilton Head Plantation Utilities, Inc., v. Public Service Comm’n of S.C., 312 S.C. 488, 452, 441.S.E2d 321, 323 (1994), holding that “[t]he Commission may receive other evidence as it be advised.”) ORS notes with interest that unlike the Hilton Head case an express direction “to receive other evidence” is missing from the Court’s Order.

While ORS does believe that the Court’s Order expressly finds that the PSC in its role as fact-finder and pursuant to regulation is entitled to request information concerning the location of capital improvements where an applicant has been given an appropriate opportunity to respond, ORS also submits that the Commission should base its decision on the evidence contained in the record. In several instances, the Court’s Order references the evidence in the record and yet nowhere does the

Court's Order expressly state the Commission may or should allow the introduction of additional evidence.

In conclusion, the Court's finding that the Commission erred in not permitting USSC to submit certain facts or evidence into the record cannot be corrected by reopening the record to allow USSC a second bite of the apple where the Court did not expressly state that the Commission could open the record to receive additional evidence. The question for the Commission on this issue on remand is whether USSC met its burden of proof based on the previously established record; not whether it can now supplement the record to meet that burden.

In light of the above, ORS requests that the Commission reconsider whether its Directive should open the record to include additional evidence and requests that the Commission consider adopting ORS's proposed order as a resolution of this matter.

Sincerely,

A handwritten signature in black ink that reads "Nanette S. Edwards". The signature is fluid and cursive, with the first name being the most prominent.

Nanette S. Edwards

cc: John M.S. Hoefer, Esquire
Benjamin P. Mustian, Esquire